Supreme Court, U. S.
FILED
AUG 31 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-352

DALLAS RAY DELAY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

KOHN, SHANDS, ELBERT, GIANOULAKIS & GILJUM
JOHN GIANOULAKIS
JOHN A. KLOBASA
411 North Seventh Street
Suite 1215
St. Louis, Missouri 63101
(314) 241-3963
Attorneys for Petitioner

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statement of the Case	2
Argument in Favor of Granting the Writ	5
Introduction	5
1. The Decision Below Conflicts With the Decisions of Other Courts of Appeal as to the Right of a Criminal Defendant to Raise on His Own Motion the Government's Violation of Its Own Internal Policies	7
2. The Decision Below Conflicts With a Decision Rendered by This Court in an Analogous Case	9
3. The Court Below Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Decided by This Court	10
Conclusion	12
Appendix A	A-1
Appendix B	A-12
Appendix C	A-14
Appendix D	A-15

Table of Cases Cited

Abbate v. United States, 359 U.S. 187, 79 S.Ct. 666 (1959) 6

Ackerson v. United States, 419 U.S. 1099, 95 S.Ct. 769, 42 L.Ed.2d 796 (1975) 11

Bartkus v. Illinois, 359 U.S. 121, 79 S.Ct. 676 (1959) .. 6

Hayles v. United States, 419 U.S. 892, 95 S.Ct. 168, 42 L.Ed.2d 136 (1974) 11, 12

Hill v. United States, 256 F.2d 957 (6th Cir., 1958) 7

Petite v. United States, 361 U.S. 529, 80 S.Ct. 450, 4 L.Ed.2d 490 (1960) 3, 6, 8, 9, 10, 11

Rinaldi v. United States, 434 U.S. 22, 98 S.Ct. 81 (1977) 9, 10, 11

Taylor v. United States, 238 F.2d 409 (9th Cir., 1956), cert. den. 77 S.Ct. 817, 353 U.S. 938, 1 L.Ed.2d 761 7

Thompson v. United States, 400 U.S. 17, 91 S.Ct. 122 (1970) 11, 12

United States v. Delay, 500 F.2d 1360 (8th Cir., 1974) . 3, 10

United States v. Heffner, 420 F.2d 809 (4th Cir., 1969) . 7, 8, 9

United States v. Leahey, 434 F.2d 7 (1st Cir., 1970) 7, 8

United States v. Mechanic, 454 F.2d 849 (8th Cir., 1971) . 3, 5

Watts v. United States, 422 U.S. 1032, 95 S.Ct. 2648, 45 L.Ed.2d 688 (1975) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. .....

DALLAS RAY DELAY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Dallas Ray Delay respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on July 18, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals which is not reported appears in Appendix A hereto. The District Court issued no opinion; however, it did sustain and adopt the Report and Recommendation of United States Magistrate David D. Noce, which appears in Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on July 18, 1979. Dallas Delay's petition for rehearing en banc was denied by the Court of Appeals for the Eighth Circuit by order dated August 6, 1979. This petition for certiorari was filed within 90 days of August 6, 1979. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

QUESTION PRESENTED

Whether Dallas Delay's prosecution and conviction by the United States should be vacated and set aside because Delay's prosecution followed his plea of guilty in State Court to crimes involving the same acts on which his federal prosecution was based and specific approval for Delay's federal prosecution was not obtained from the United States Attorney General, and whether there was a compelling reason to prosecute Delay in federal court.

STATEMENT OF THE CASE

On January 23, 1974 petitioner Dallas Ray Delay (hereinafter "petitioner") was convicted in the United States District Court, Eastern District of Missouri, Eastern Division, on one count of bank robbery in violation of 18 U.S.C. § 2113(a) and three counts of killing in an attempt to avoid apprehension for the offense of bank robbery in violation of 18 U.S.C. § 2113(e). Petitioner was sentenced to 20 years imprisonment on the § 2113(a) count and three consecutive 100-year terms of imprisonment on the three § 2113(e) counts. On appeal to the United States Court of Appeals for the Eighth Circuit the judgment of conviction was affirmed but the sentences on Counts I

(§ 2113(a)) and Counts II and III (§ 2113(e)) were vacated. The sentence of 100 years imprisonment under Count IV was permitted to stand. *United States v. Delay*, 500 F.2d 1360 (8th Cir. 1974).

On July 31, 1978 petitioner filed his Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 (hereinafter sometimes referred to as the "§ 2255 Motion") in the United States District Court for the Eastern District of Missouri, Eastern Division, being Cause No. 78-786C(1). Jurisdiction in the District Court was invoked pursuant to 28 U.S.C. § 2255. Petitioner's motion alleged that his federal prosecution for bank robbery and killing in an attempt to avoid apprehension for bank robbery violated the *Petite* policy of the Department of Justice. (See *United States v. Mechanic*, 454 F.2d 849, 855 (8th Cir. 1971), note 5, for full text of *Petite* policy.) Petitioner's federal prosecution and conviction followed his plea of guilty to murder in the first degree in Missouri state court. Petitioner was sentenced to three consecutive life sentences in state prison. The state and federal offenses grew out of the same acts of petitioner. The § 2255 motion alleged that the subsequent federal prosecution was conducted without the express prior approval of the United States Attorney General as required by the *Petite* policy of the Department of Justice. The motion further alleged that no "compelling reason" existed to prosecute petitioner because he had already been sentenced in Missouri state court to three consecutive life terms in prison for crimes involving the same acts. The *Petite* policy requires not only express prior approval of the United States Attorney General but also a "compelling reason" before a federal prosecution may follow a state prosecution.

On November 20, 1978, United States Magistrate David D. Noce filed his Report and Recommendation (Appendix B) relating to petitioner's Motion, recommending that the action be

dismissed without further proceedings. On December 18, 1978, the Honorable James H. Meredith adopted the Report and Recommendation of the United States Magistrate and ordered that the action be dismissed. Petitioner was not given an evidentiary hearing in the district court and the dismissal came before petitioner was able to seek leave to pursue discovery.

On January 12, 1979, petitioner filed his notice of appeal to the United States Court of Appeals for the Eighth Circuit. Jurisdiction was invoked pursuant to 28 U.S.C. §§ 1291, 2106 and 2255. On July 18, 1979, the United States Court of Appeals affirmed the District Court's dismissal of petitioner's motion (opinion attached, Appendix A). On August 6, 1979, the Court of Appeals denied a rehearing en banc.

ARGUMENT IN SUPPORT OF GRANTING THE WRIT

Introduction

On April 6, 1959, United States Attorney General William P. Rogers issued a Department of Justice News Release wherein he set forth the formal policy of the Department of Justice in regard to federal prosecutions following state prosecutions for crimes involving the same acts on which the federal prosecution is based. For the complete text of the Department of Justice news release see *United States v. Mechanic, supra,* at 855, note 5. That news release, which set forth the formal policy of the Department of Justice, stated in part:

> After a state prosecution there should be no federal trial for the same act or acts unless the reasons are compelling.
>
> * * *
>
> . . . [N]o federal case should be tried when there has already been a state prosecution for substantially the same act or acts without the United States Attorney first submitting a recommendation to the appropriate Assistant Attorney General in the Department. No such recommendation should be approved by the Assistant Attorney General in charge of the Division without having it first brought to my attention.

The requirements of this Department of Justice policy are twofold: (1) "compelling reasons" must exist for the federal prosecution after the state prosecution, and (2) specific approval must be sought and obtained by the United States Attorney from the appropriate Assistant Attorney General and the Assistant Attorney General may not give his approval without first bringing the subsequent federal prosecution to the attention of the Attorney General.

This policy outlawing multiple state-federal prosecutions for offenses arising out of the same acts has come to be known as the *Petite* policy, so named for *Petite v. United States,* 361 U.S. 529, 80 S.Ct. 450, 4 L.Ed.2d 490 (1960), wherein this Court first recognized the existence of this policy. The *Petite* policy was promulgated by the Department of Justice in response to this Court's holding in *Bartkus v. Illinois,* 359 U.S. 121, 79 S.Ct. 676 (1959) and *Abbate v. United States,* 359 U.S. 187, 79 S.Ct. 666 (1959), two decisions handed down March 30, 1959, wherein this Court affirmed the existence of the Government's power to prosecute a defendant under federal law for the same act or acts upon which defendant had already been prosecuted in state court.

Petitioner's federal prosecution ran afoul of the *Petite* policy. His federal prosecution, conviction and sentencing for bank robbery and killing in an attempt to avoid apprehension for the bank robbery followed his prosecution and plea of guilty to murder in the first degree in Missouri state court for the same acts. Petitioner was sentenced to serve three consecutive life terms in the Missouri State Penitentiary. His subsequent federal prosecution could not be authorized unless the circumstances of his particular case presented "compelling reasons" and then, only after specific approval had been obtained from the appropriate assistant United States Attorney General.

No "compelling reasons" existed for petitioner's federal prosecution following his state prosecution and sentencing. Dallas Ray Delay had already been sentenced to serve three *consecutive* life terms in state court for offenses arising out of the same acts and he continues to serve those sentences. The imposition of this harsh sentence served to adequately protect the interests of the federal sovereign.

Additionally, the *Petite* policy was violated due to the Government's failure to obtain the approval of the United States

Attorney General for the prosecution. For the purposes of this petition this Court must accept as true petitioner's assertion that express prior approval for his federal prosecution was not obtained. When a §2255 motion is denied without an evidentiary hearing and where the government has filed no responsive pleading denying the factual allegations in the §2255 motion, the reviewing court must accept those allegations as true. *Hill v. United States,* 256 F.2d 957 (6th Cir., 1958), *Taylor v. United States,* 238 F.2d 409 (9th Cir., 1956), cert. den. 77 S.Ct. 817, 353 U.S. 938, 1 L.Ed.2d 761.[1]

1. The Decision Below Conflicts With the Decisions of Other Courts of Appeal as to the Right of a Criminal Defendant to Raise on His Own Motion the Government's Violation of Its Own Internal Policies.

The decision below is in direct conflict with the decisions of the Fourth and First Circuit Courts of Appeal in *United States v. Heffner,* 420 F.2d 809 (4th Cir., 1969) and *United States v. Leahey,* 434 F.2d 7 (1st Cir., 1970). The Eighth Circuit Court of Appeals has contravened the *Heffner* and *Leahey* holdings by holding herein that petitioner could not, on his own motion, seek to enforce the internal *Petite* policy of the Justice Department.

---

[1] It is the belief of petitioner that his federal prosecution was conducted without a recommendation of the U. S. Attorney and without the express approval of the appropriate assistant United States Attorney General. On November 29, 1973 counsel for petitioner inquired by letter, a copy of which is attached hereto as Appendix C, directed to Donald Stohr, United States Attorney, as to whether approval for petitioner's prosecution had ever been obtained. This letter was never answered and it is petitioner's belief that such approval was never obtained. Petitioner's motion pursuant to 28 U.S.C. §2255 was dismissed without an evidentiary hearing and before petitioner had the opportunity to pursue discovery pursuant to Rule 6 governing 28 U.S.C. §2255 proceedings, in order to prove that no such authorization was sought or received. Accordingly, petitioner was denied his right to prove to the district court that his federal prosecution violated the *Petite* policy.

In *United States v. Heffner, supra,* appellant had been convicted of willfully furnishing an employer with a false and fraudulent statement of federal income tax withholding exemptions. The Internal Revenue Service agents who investigated appellant did not, in the course of their interview, warn him that their function was to investigate criminal fraud and did not advise him of his right to retain counsel. These omissions violated an Internal Revenue Service news release concerning department policy. In overturning the conviction, the Court of Appeals for the Fourth Circuit held at 420 F.2d at 811-812:

> An agency of the government must scrupulously observe rules, regulations or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down.
>
> * * *
>
> It is of no significance that the procedures or instructions which the IRS has established are more generous than the Constitution requires.

The court, in passing upon the request that a Government agency follow its procedures stated at 420 F.2d 812:

> These cases are consistent with the doctrine's purpose to prevent the arbitrariness which is inherently characteristic of an agency's violation of its own procedures.

The court further stated that the fact that the Internal Revenue Service policy was promulgated in a press release and was not a formal regulation was of no effect. The court's holding herein directly contradicts the holding of the Fourth Circuit in *Heffner.* Petitioner was not allowed to raise the Government's *Petite* policy issued in a press release whereas the appellant in *Heffner* was allowed to raise a Government policy set forth in a press release.

In *United States v. Leahey, supra,* the First Circuit Court of Appeals held that evidence obtained by the Internal Revenue

Service from the defendant had been properly suppressed at trial. The evidence had been obtained without an Internal Revenue Service agent informing the defendant that he had the function of investigating possible criminal tax fraud and that the defendant had the right to remain silent and the right to counsel. Internal Revenue Service policy, issued in the same press release that was in question in *United States v. Heffner, supra,* required such notification. The court held that the due process clause required the Internal Revenue Service to follow and to be bound by the procedures it had announced in its press release. The defendant was allowed to raise the issue of the Internal Revenue Service's violation of its policy, as set forth in its press release, on her own motion.

Heffner and *Leahey* demonstrate that petitioner is entitled to have the *Petite* policy enforced, on his own motion. The opinion of the Eighth Circuit Court of Appeals herein is in conflict with *Heffner* and *Leahey* and for that reason this Court should grant certiorari.

2. **The Decision Below Conflicts With a Decision Rendered by This Court in an Analogous Case.**

Recently, in *Rinaldi v. United States,* 434 U.S. 22, 98 S.Ct. 81 (1977), the defendant was tried and convicted in Florida state court for participating in a plot to rob safe deposit boxes in a Florida hotel. Subsequently, he was tried and convicted in federal court for offenses arising out of the same acts. The Solicitor General agreed with the defendant's assertions that "his federal conviction was obtained in violation of established federal policy against multiple prosecutions for the same offense." 98 S.Ct. at 82. This Court vacated the judgment based upon the Government's violation of its *Petite* policy and remanded the case to the district court for the purpose of dismissing the indictment. In so doing, this Court stated at 98 S.Ct. 84:

> The [Petite] policy is useful to the efficient management of limited executive resources and encourages local responsibility in law enforcement. But it also serves *the more important purpose of protecting the citizen from any unfairness that is associated with successive prosecutions based on the same conduct.* [Emphasis added]

Although *Rinaldi* involved a confession by error by the Solicitor General, this Court made its position clear, through the above-quoted excerpt from its opinion, that the *Petite* policy's "more important purpose" is to confer affirmative rights on criminal defendants. In the absence of such enforceable rights the enforcement of the *Petite* policy is subject to the whim of the prosecutor and, accordingly, will be administered and applied unequally.

The holding of the Eighth Circuit Court of Appeals herein directly conflicts with the views on enforceability of the *Petite* policy as expressed by this Court in *Rinaldi*[2] and for that reason this Court should grant certiorari.

3. **The Court Below Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Decided by This Court.**

In its decision herein the United States Court of Appeals for the Eighth Circuit decided an important question of federal

---

[2] It should be noted that Judge Heaney, in his concurrence herein, agreed with this Court's position on the *Petite* policy by stating: "In my view, when a defendant has properly raised this policy at the District Court level and raises it again on direct appeal, we should follow the lead of the Supreme Court in *Rinaldi v. United States,* 434 U.S. 22, 27 (1977), and hold that the policy against multiple prosecutions serves the 'important purpose of protecting the citizen from any unfairness that is associated with successive prosecution based on the same conduct'." We add that this issue was raised on direct appeal in our brief on page 28, Appendix D attached hereto, but was not ruled on by the U. S. Court of Appeals in its decision on direct appeal. *United States v. Delay,* 500 F.2d 1360 (8th Cir., 1974).

law, to wit: whether a criminal defendant may raise on his own motion the Government's violation of its *Petite* policy. This precise question has never before been decided by this Court.[3] The issue at hand is an important question of federal law because it deals with the very right of a criminal defendant to require the Justice Department to abide by the *Petite* policy and thereby halt prosecution. If the ruling herein by the Eighth Circuit Court of Appeals is allowed to stand without review by this Court the result will be (as has been the result in the past) that enforcement of the *Petite* policy will be subject to the whim of the prosecutor. Certain criminal defendants (such as petitioner) will be denied the benefits of the *Petite* policy whereas others will be accorded its benefits. This Court should review the issue at hand in order to ensure that all criminal defendants stand on an equal footing.

On many occasions in the past this Court has granted certiorari to criminal defendants seeking to enforce the *Petite* policy. Petitioner knows of no case in which this Court has had the opportunity to directly rule on the present issue because in each case in the past wherein the identical issue was raised, either the Solicitor General or the Department of Justice confessed error. See *Ackerson v. United States,* 419 U.S. 1099, 95 S.Ct. 769, 42 L.Ed.2d 796 (1975), *Hayles v. United States,* 419 U.S. 892, 95 S.Ct. 168, 42 L.Ed.2d 136 (1974), *Watts v. United States,* 422 U.S. 1032, 95 S.Ct. 2648, 45 L.Ed.2d 688 (1975), and *Thompson v. United States,* 400 U.S. 17, 91 S.Ct. 122 (1970). In each of these cases this Court felt that the issue of the right of a criminal defendant to enforce the *Petite* policy was of sufficient importance to warrant the granting of certiorari. Cert. granted, *Ackerson v. United States,* 95 S.Ct. 769

---

[3] Although this Court indicated in *Rinaldi v. United States, supra,* that a criminal defendant should be accorded the rights embodied in the *Petite* policy (see Point 2), the *Rinaldi* opinion arose upon a confession of error by the Solicitor General.

(1975), *Hayles v. United States*, 95 S.Ct. 168 (1964), *Watts v. United States*, 95 S.Ct. 2648 (1975) and *Thompson v. United States*, 91 S.Ct. 122 (1970). Similarly, in the present case, where the identical issue is presented, this Court should grant certiorari so as to enable this Court to decide finally the issue that has been before it on numerous occasions, yet remains undecided.

CONCLUSION

For the foregoing reasons it is respectfully submitted that a Writ of Certiorari should issue to review the judgment and opinions of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

KOHN, SHANDS, ELBERT,
GIANOULAKIS & GILJUM

JOHN GIANOULAKIS

JOHN A. KLOBASA
411 North Seventh Street
St. Louis, Missouri 63101
(314) 241-3963
Attorneys for Petitioner

APPENDIX

APPENDIX A

United States Court of Appeals
For the Eighth Circuit
No. 79-1070

Dallas Ray Delay,
Appellant,
v.
United States of America,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri

Submitted: May 14, 1979
Filed: July 18, 1979

Before GIBSON, Chief Judge, HEANEY, Circuit Judge, and MacLAUGHLIN, District Judge.*

GIBSON, Chief Judge.

This is an appeal from an order of the District Court[1] denying Dallas Ray Delay's motion to vacate, set aside, or correct a sentence of 100 years' imprisonment imposed in 1974 after Delay was convicted in the same District Court of bank robbery and three counts of killing in an attempt to avoid apprehension for bank robbery. The present motion was filed pursuant to 28 U.S.C. § 2255, and alleged that Delay's federal sentence and prosecution was in violation of Delay's privilege

---

* The Honorable Harry H. MacLaughlin, United States District Judge, District of Minnesota, sitting by designation.

[1] The Honorable James H. Meredith, Chief Judge, United States District Court for the Eastern District of Missouri.

against double jeopardy and the policy of the Justice Department generally to refrain from prosecution of those convicted in state courts of crimes arising from the same set of operative facts. After carefully considering the briefs and the arguments of the parties, we affirm.

On January 17, 1973, Delay abducted Mr. and Mrs. Bob Reid Ketterman and their 17-year-old daughter. An explosive device was strapped to the back of Mr. Ketterman. He was then directed to go to the Bank of Grandin, Missouri, where he served as president, withdraw funds, and return to the site where Mrs. Ketterman and the daughter were being held hostage. Mr. Ketterman did as he was directed, and returned with $10,850 to the area where Delay held the two women. In return for his cooperation, Mr. Ketterman, his wife, and daughter were tied to trees and executed by the appellant.

On January 19, 1973, Delay was arrested, and on May 8, 1973, he pled guilty to three counts of murder in the first degree in Missouri state court. He was eventually sentenced to three consecutive life sentences and is now serving that time. Following a jury trial, Delay was convicted in the United States District Court on January 23, 1974, of one count of bank robbery and three counts of killing in an attempt to avoid apprehension for the offense of bank robbery. On direct appeal this court carefully considered and rejected numerous allegations of error in the trial of Delay. *United States v. Delay*, 500 F.2d 1360 (8th Cir. 1974). Because of our holding that under the statute only one punishment could be imposed for violation of the various provisions of the bank robbery statute, we vacated the sentence for bank robbery and two of the sentences for killing in an attempt to avoid apprehension for bank robbery. However, we affirmed the 100-year sentence imposed on the third killing-in-an-attempt-to-avoid apprehension count.

In filing the present motion, Delay contended before the District Court that his federal sentence should be vacated because the prosecution was in violation of the fifth amendment prohibition against double jeopardy. He also argued that his prosecution violated the announced policy of the Department of Justice, requiring prior specific approval from the Attorney General in cases where a federal prosecution is based on the same acts as involved in a state conviction. In this appeal, Delay no longer contends that the fifth amendment prohibition on double jeopardy was violated by his federal prosecution and conviction. The report of the United States Magistrate, which was adopted by the District Court, had rejected this claim because it had been made and denied on direct appeal. *United States v. Delay*, 500 F.2d 1360, 1362 (8th Cir. 1974). It is well that Delay no longer pursues this argument, since few matters are more firmly established than that the fifth amendment does not prohibit prosecution by both federal and state officials for crimes against each sovereign involving the same acts. *Abbate v. United States*, 359 U.S. 187 (1959); *Bartkus v. Illinois*, 359 U.S. 121 (1959); *Westfall v. United States*, 274 U.S. 256 (1927); *United States v. Lanza*, 260 U.S. 377 (1922); *Moore v. Illinois*, 55 U.S. (14 How.) 13 (1852); *United States v. Marigold*, 50 U.S. (9 How.) 560 (1850); *Fox v. Ohio*, 46 U.S. (5 How.) 410 (1847); *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820).

Delay still does contend that he should receive relief from his federal sentence due to the alleged failure of the United States Attorney to obtain the approval of the Attorney General for Delay's prosecution after the state conviction. A failure to obtain prior approval would apparently contravene the announced policies of the United States Department of Justice. An understanding of those policies is necessary for the disposition of this appeal.[2]

---

[2] The United States has suggested that this is not a matter which may properly be raised in a motion under 28 U.S.C. § 2255, since it

The Justice Department policy involved in this case was first expressed by Attorney General William P. Rogers in a news release dated April 6, 1959.[3] In that news release, the Attorney General stated that the power of the federal government to prosecute a defendant who had previously been prosecuted in state court for the same act or acts should be sparingly used. Specifically, he expressed the view that such prosecutions should not occur "unless the reasons are compelling." He doubted "that it is wise or practical to attempt to formulate detailed rules to deal with the complex situation which might develop, particularly because a series of related acts are often involved." However, he expressed the view that prior to trial of a federal case following a state prosecution, a recommendation should be submitted by the United States Attorney to the appropriate Assistant Attorney General, and no such recommendation should be approved without its having first been brought to the attention of the Attorney General. Significantly, the language of the news release does not indicate an absolute rule of prior permission being required for such a prosecution. The policy expressed by Attorney General Rogers has been adopted by subsequent attorneys general. However, it is not part of the Code of Federal Regulations and has not been statutorily adopted by Congress. Obviously, a department of the Executive Branch has no power to make laws or overrule decisional holdings of the courts. However, the Executive department or official can exercise discretion within proper bounds.

---

could have been raised on direct appeal. In *Houser v. United States,* 508 F.2d 509 (8th Cir. 1974), we considered in detail matters which are or are not cognizable under 28 U.S.C. § 2255. It would be fruitless for us to re-explore that body of law in this opinion. We are satisfied that it is essential that we reach the merits of Delay's claim in order to dispose of this appeal.

[3] Pertinent portions of that news release have been quoted by this court previously. *United States v. Mechanic,* 454 F.2d 849, 855 n.5 (8th Cir. 1971), *cert. denied,* 406 U.S. 929 (1972).

In 1960, in a case involving prosecutions in two different United States district courts for crimes arising from related conduct, the Supreme Court mentioned the press release of Attorney General Rogers. *Petite v. United States,* 361 U.S. 529 (1960). That marked the first reference to the policy by the Supreme Court and hence led to its being referred to as the "*Petite* policy." In some subsequent cases, the Supreme Court vacated and remanded for dismissal convictions obtained in the federal district courts. *Watts v. United States,* 422 U.S. 1032 (1975), *vacating* 505 F.2d 951 (5th Cir. 1974); *Ackerson v. United States,* 419 U.S. 1099 (1975), *vacating* 502 F.2d 300 (8th Cir. 1974); *Hayles v. United States,* 419 U.S. 892 (1974), *vacating* 492 F.2d 125 (5th Cir. 1974); *Thompson v. United States,* 400 U.S. 17, *vacating* 421 F.2d 373 (5th Cir. 1970). These cases may have involved the policy against dual prosecutions. The Supreme Court, upon request of the Government, disposed of these cases by *per curiam* order, thus they do not indicate any right of criminal defendants to obtain enforcement of the policy.

Recently the Supreme Court has considered the Justice Department policy against dual prosecutions more directly. In *Rinaldi v. United States,* 434 U.S. 22 (1977), the Court, by *per curiam* opinion, vacated the judgment of the court of appeals and remanded the case to the district court for the purpose of dismissing the indictment. Rinaldi had been convicted in the United States district court and also in the courts of the State of Florida for his participation in a plot to rob safety deposit boxes. When the federal prosecution reached the Fifth Circuit, the Government moved the court of appeals to remand the case to the district court to permit it to seek dismissal of the indictment due to the violation of the federal policy against multiple prosecutions. The court of appeals granted the motion to remand. However, the district court denied the motion to dismiss, in part because it concluded that the prosecutor had

acted in bad faith in representing to the district court that he had been instructed to maintain the prosecution during the original trial. The Fifth Circuit affirmed the district court's denial of the motion but the Supreme Court reversed. It noted that the policy against multiple prosecutions "is useful to the efficient management of limited Executive resources and encourages local responsibility in law enforcement. But it also serves the more important purpose of protecting the citizen from any unfairness that is associated with successive prosecutions based on the same conduct." 434 U.S. at 27 (footnote omitted). The Court went on to hold: "The defendant, therefore, should receive the benefit of the policy whenever its application is urged by the government." 434 U.S. at 31. It is clear that under *Rinaldi* if the Government were now urging us on a direct appeal to permit it to dismiss the case after a remand to the District Court, we would be required to comply, at least in the absence of bad faith in making that request. However, there is nothing in *Rinaldi* to suggest that the defendant has any enforceable right to the benefits of the policy over the objections of the United States.

This court has on several occasions had reason to discuss the policy announced in Attorney General Rogers' press release. In *United States v. Mechanic*, 454 F.2d 849 (8th Cir. 1971), *cert. denied*, 406 U.S. 929 (1972), we noted that the policy "is wise and ought to be followed." 454 F.2d at 856. However, we did not find support in the record to set aside the conviction on that ground. In *United States v. Wedelstedt*, 589 F.2d 339 (8th Cir. 1978), we affirmed the conviction and noted that the Justice Department policy does not give individual defendants any rights to seek dismissal on the basis of the *Petite* policy. In that case there had been an *ex post facto* approval of the prosecution by Justice Department personnel. Finally, in *United States v. King*, 590 F.2d 253 (8th Cir. 1978), Senior Judge Van Oosterhout stated for the court that enforcement of the *Petite*

policy lies with the Attorney General and an individual defendant cannot avoid prosecution on the basis of it. However, we alternatively noted that the federal conviction had occurred prior to the disposition of the state criminal litigation. Thus, while we have repeatedly stated that criminal defendants are not entitled to enforcement of this policy against the objection of the Government, we have not until today been factually presented with the legal issue here involved.

Delay's request for relief was dismissed without an evidentiary hearing, and without a responsive pleading from the Government denying the allegation that the federal prosecution was pursued without the prior approval of the Justice Department. Thus, for the purpose of this opinion, we must take that allegation as true. The critical question before us is whether a Justice Department policy, announced through a press release from the Attorney General, grants a criminal defendant any rights greater than those guaranteed by the fifth amendment.

Delay cites *United States v. Heffner*, 420 F.2d 809 (4th Cir. 1970), and *United States v. Leahey*, 434 F.2d 7 (1st Cir. 1970). Those cases held that a criminal defendant was entitled to a remedy when Internal Revenue Service special agents, investigating the defendant's alleged tax fraud, had failed to inform the defendant that they were investigating possible tax fraud. An Internal Revenue Service policy announced in a news release required that special agents make such a statement to the subjects of criminal tax fraud investigations. Those cases include one factor that distinguishes them clearly from the present situation. As noted by the court in *Leahey*, the guideline requiring the special agents to announce the purpose of their investigation affected the post-offense conduct of citizens involved in the criminal investigation. In other words, a citizen alerted that a criminal tax fraud investigation was underway might consult with an attorney or invoke other constitutional rights which he would not feel compelled to invoke if the investigation merely involved

civil tax liability. The present situation, involving prior permission before federal prosecution and trial is held, does not involve an activity that could affect the actions of the criminal defendant. *Heffner* and *Leahey*, in their concern with investigative techniques, do not provide an appropriate analogy for overturning a criminal conviction because of non-observance of an internal rule of the Department of Justice.

On the other hand, the issue now before us has been squarely faced by the Seventh Circuit. In *United States v. Hutul*, 416 F.2d 607, 626 (7th Cir. 1969), the Court rejected a contention based on the 1959 press release of Attorney General Rogers, and noted that a press release not promulgated as a regulation and published in the Federal Register cannot serve to invalidate an indictment: "Rather, such a statement is merely a 'housekeeping provision' of the Justice Department and is so limited in its effect." Similarly, the Supreme Court has rejected a defense based on violation of a Justice Department circular letter requiring authorization from the Attorney General's office before evidence could be presented to the grand jury. *Sullivan v. United States*, 348 U.S. 170 (1954). Finally, this term the Supreme Court held that violation of regulations in the Internal Revenue Service manual, prohibiting certain consensual electronic surveillance unless specified prior authorization had been obtained, did not require exclusion of the evidence, nor did the agency's violation of its regulations amount to a denial of equal protection. *United States v. Caceres*, 47 U.S.L.W. 43, 49 (Sup. Ct. April 2, 1979). In view of these holdings by the Supreme Court as well as the holding of the Seventh Circuit and our prior statements on this issue, we hold that a criminal defendant has no rights under the internal policy of the Justice Department to limit dual federal-state prosecutions.

In the case here considered, the brutality of the senseless, cold-blooded killing of three innocent individuals in an attempt to avoid apprehension for the commission of another criminal

act illustrates the absurdity of imposing disqualifying sanctions against prosecution on the basis of a violation of a housekeeping rule of an Executive department. No constitutional rights of the appellant were violated with the institution of the federal charges arising out of his activities, but contrariwise, the appellant displayed a singular lack of concern with the constitutional right to life previously enjoyed by his victims.

At oral argument, it was suggested that even if the policy announced in the 1959 press release did not confer rights on criminal defendants, the courts should in some manner enforce the provisions of that release out of concern for the efficient use of limited judicial resources. The concern apparently is with the occasional situation in which the Solicitor General has moved in the Supreme Court for the vacation of a judgment of a court of appeals and remand of the case for the purpose of dismissal. We have been cited to only a handful of instances in which such action may have been related to violation of the policy involved in this case. We are not convinced that even if enforcement of the policy out of concern for judicial resources were proper, it would in fact conserve those resources in this situation.

If we were to adopt such a rule, it would in effect mean that in every criminal case in which state charges are pending or might have been concluded for crimes arising out of related facts, the district court and eventually the court of appeals would have to determine whether the situation came within the intent of the Attorney General's policy, and whether as a factual matter that policy had been followed. This would result in further complication of litigation and probably result in some cases being delayed while answers were obtained from the Justice Department bureaucracy. If in some cases in the past judicial resources have been wasted by the Justice Department's actions, those instances have occurred at the Supreme Court level. We have not discovered any language in the opinions of

the Supreme Court to indicate concern over the situation. In short, the Attorney General has announced a policy for the internal operation of the Justice Department. He is free to change that policy at any time and is free to enforce it as he sees fit. To further complicate criminal litigation by involving the courts in this activity would be unwise and would have an adverse effect on the administration of criminal justice.

Affirmed.

HEANEY, Circuit Judge, concurring.

I concur in the result reached by the majority, but I cannot agree with the dicta in the opinion that a criminal defendant never has a right to have a conviction set aside because of a violation of the *Petite* policy. In my view, when a defendant has properly raised this policy at the District Court level and raises it again on direct appeal, we should follow the lead of the Supreme Court in *Rinaldi v. United States*, 434 U.S. 22, 27 (1977), and hold that the policy against multiple prosecutions serves the "important purpose of protecting the citizen from any unfairness that is associated with successive prosecution based on the same conduct."

I recognize that the Supreme Court in *Rinaldi* was considering the question on the application of the government. I believe, however, that the policy should be enforceable by a defendant in an appropriate case. This case is not an appropriate one. The defendant was aware of the policy and its violation before the direct appeal to this Court and failed to raise the issue. He should not be permitted to raise it now. We need decide nothing more on this appeal.

The majority states the obvious when it notes that the killings were brutal and implies that the three consecutive life sentences imposed on the defendant are somehow insufficient, and

that the federal government is justified in imposing another ninety-nine years. However, the adequacy of the punishment is not the issue. The question is whether the United States District Attorney should be required to receive permission from the Department of Justice before instituting a successive prosecution. I believe that he should. The *Petite* policy is of long standing and is designed to achieve fairness, encourage the states to enforce the law and conserve judicial time. Its enforcement by a defendant is necessary to achieve the first and primary goal.

It is difficult for me to understand why any case should be delayed or complicated by the simple requirement of asking the Justice Department for permission to proceed in a case where the accused has already been charged and convicted in state court.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX B

United States District Court, Eastern District
of Missouri, Eastern Division

Dallas Ray Delay,
Petitioner,
v.
United States of America,
Respondent.
No. 78-786 C (1)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE

The petition of Dallas Ray Delay under 28 U.S.C. §2255 to vacate and set aside his 1974 conviction in this Court was referred to the undersigned United States Magistrate for initial review and a recommended disposition. 28 U.S.C. §636(b). Petitioner was convicted of bank robbery and three counts of killing to avoid apprehension for the robbery. He had previously pled guilty in Missouri state court to three counts of first degree murder. The state charges arose from the same killings as did the federal charges of killing to avoid apprehension. The federal convictions were affirmed on direct appeal. *United States v. Delay*, 500 F.2d 1360 (8th Cir. 1974).

In this action petitioner alleges first that the federal prosecution and convictions, coming after the state prosecution and convictions, violated his right under the Fifth Amendment not to be placed twice in jeopardy for the same offenses. This claim was made on direct appeal and was denied. 500 F.2d at 1362. Therefore, it may not be raised again under §2255. *Houser v. United States*, 508 F.2d 509, 514 (8th Cir. 1974).

Secondly, petitioner alleges that his federal prosecution violated the Department of Justice policy proscribing dual prosecution* without the approval of the Attorney General of the United States. *Cf., Petite v. United States*, 361 U.S. 529 (1960). This so-called *Petite* policy requires that dual prosecution be founded upon compelling reasons, in the interest of fairness. This policy, however, is one of internal governmental management. It does not confer upon petitioner an enforceable right without a governmental request for dismissal. *See, United States Thompson*, 579 F.2d 1184, 1186 (10th Cir. 1978); *United States v. Valenzuela*, — F.2d — (10th Cir. slip op. No. 78-1269, filed October 5, 1978); *cf., United States v. Wallace*, 578 F.2d 735, 740 n.4 (8th Cir. 1978). Such request is absent in this case and its absence renders inapposite the cases relied upon by petitioner, *Ackerson v. United States*, 419 U.S. 1099 (1975); *Hayles v. United States*, 419 U.S. 892 (1974); *Thompson v. United States*, 400 U.S. 17 (1970).

RECOMMENDATION

For the reasons set out above, it is the opinion of the undersigned United States Magistrate that the instant petition for relief under 28 U.S.C. §2255 is without merit. It is recommended that the action be dismissed without further proceedings. The parties may file written objections to this Report and Recommendation within ten days.

Respectfully submitted,

DAVID D. NOCE
United States Magistrate

Dated this 20th day of November, 1978.

---

* Such policy proscribes the prosecution of persons already prosecuted by state courts for crimes arising out of the same acts as the state charges. *See United States v. Mechanic*, 454 F.2d 849, 855 n.5 (8th Cir. 1971).

APPENDIX C

November 29, 1973

Mr. Donald J. Stohr
United States Attorney
U.S. Court and Customhouse
11th and Market Streets
St. Louis, Missouri 63102

Re: *Dallas Ray Delay, No. S73CR11*

Dear Don:

In reading an article on double jeopardy in 80 Harvard Law Review at page 1551 (footnote 87) I found a reference to a 1959 release by the Attorney General of the United States ". . . that no Federal prosecution would follow a state trial for the same act except in unusual circumstances, and then only with his express approval." I wonder if the foregoing is still the policy of the Attorney General's Office and if so, whether any of your predecessors, or you, have sought the express approval of the Attorney General for prosecuting Dallas Ray Delay for the same acts; i.e., killing the Kittermans, for which he was prosecuted in state court and for which he received three consecutive life sentences.

If such approval has not been sought, I wonder if you would be good enough to obtain such approval or let me know if you do not intend to seek such approval.

Very truly yours,

JOHN GIANOULAKIS

JG/NH

APPENDIX D

* * * * * * *

Before Cole County, Missouri Circuit Court.

As an additional ground we add that the U. S. Attorney has made no showing that he sought and obtained the express approval of the Attorney General when a federal prosecution follows a state prosecution for the same act as required by a 1959 official release. See 80 Harv.L.Rev. 1538 at 1551 (fn. 87). We believe the government has the burden of affirmatively showing this approval. However, we attach as Appendix A our letter of November 29, 1973 to the U. S. Attorney which was never answered.

For all the foregoing reasons, the judgment should be reversed.

II

DEFENDANT'S MOTION FOR A DIRECTED VERDICT OF ACQUITTAL AT THE CLOSE OF THE GOVERNMENT'S CASE AND AT THE CLOSE OF ALL THE EVIDENCE SHOULD HAVE BEEN GRANTED AS TO COUNTS II, III, AND IV (VIOLATION OF 18 U.S.C. 2113[e]) BECAUSE THE ONLY EVIDENCE, IF ANY, OF THE SPECIFIC INTENT REQUIRED OF KILLING IN AN ATTEMPT TO AVOID APPREHENSION FOR THE BANK ROBBERY CONSISTED OF DEFENDANT'S OWN POST-CRIME, EXTRA-JUDICIAL ADMISSIONS.

While we realize that state of mind must frequently be shown by circumstantial evidence, *Gay v. U.S.*, 408 F.2d 923 at 929 (C.A. 8, 1969), it is our position that the government has failed to prove beyond a reasonable doubt that Dallas Ray Delay killed the Kittermans in an attempt to avoid apprehension for the bank robbery. The only evidence of defendant's intent was
* * *

* * * * * * * *